

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DW 04-048

ORDER OF NOTICE

On March 25, 2004, the City of Nashua, New Hampshire (Nashua) filed with the New Hampshire Public Utilities Commission (Commission) a Petition for Valuation pursuant to RSA 38:9. New Hampshire RSA Chapter 38 authorizes municipalities to establish, expand, take, purchase, lease, or otherwise acquire, maintain, and operate utilities for the use of its inhabitants. Pursuant to RSA 38:9, if a dispute arises between the municipality and the public utility as to how much of the plant and property lying within or without the municipality the public interest requires the municipality to acquire, the Commission is essentially charged with determining what plant and property is required, the value of that plant and property, and the amount of any damages suffered by the public utility by the severance of the plant and property.

Nashua seeks the Commission's determination of a fair market value of the plant and property of Pennichuck Corporation's three regulated utilities: Pennichuck Water Works, Inc. (PWW); Pennichuck East Utilities, Inc. (PEU); and Pittsfield Aqueduct Company, Inc. (PAC) (collectively, the Pennichuck Utilities). The Pennichuck Utilities are all public utilities as defined by RSA 362:2 and RSA 362:4, and are thus regulated by the Commission and subject to RSA 38.

As explained in Nashua's Petition, the Pennichuck Utilities provide utility service across a broad area of New Hampshire including service in the following municipalities: Amherst; Atkinson; Bedford; Derry; Epping; Hollis; Hooksett; Londonderry; Merrimack;

Milford; Nashua; Newmarket; Pelham; Pittsfield; Plaistow; Raymond; Salem; Sandown; and Windham. Nashua's Petition sets forth, in detail, the history of its desire to acquire the plant and property of the Pennichuck Utilities. That history will not be recited here, however, interested parties may refer to the Commission's web site, www.puc.state.nh.us, where Nashua's Petition can be viewed in full.

On April 5, 2004, the Pennichuck Utilities filed a motion requesting that the Commission either dismiss Nashua's Petition, in full or in part, or in the alternative, stay the proceeding. The motion to dismiss can also be viewed in its entirety on the Commission's web site. The Pennichuck Utilities make four arguments, three of which raise substantive issues of how the Commission should treat Nashua's filing, and the fourth involves the constitutionality of the statute authorizing the Commission to review Nashua's Petition.

Other pleadings have been filed in the instant docket, DW 04-048, and include the following. On April 15, 2004, the Town of Milford filed for intervention. On April 15, 2004, the City of Nashua filed with the Commission an objection to the Pennichuck Utilities' motion to dismiss. On April 29, 2004, the City of Nashua filed with the Commission a Motion to Disqualify the Pennichuck Utilities' Counsel, to which the Pennichuck Utilities objected on May 10, 2004. On May 26, 2004, the Town of Milford filed with the Commission a Motion to Consider and Maintain Effectiveness of Existing Contract. On June 4, 2004, the Pennichuck Utilities filed a response to Milford's Motion to Consider, which effectively asked the Commission to defer consideration of the issues raised in the Motion. According to the Pennichuck Utilities, Milford concurred with the response.

Concurrently, the Pennichuck Utilities and their parent, Pennichuck Corporation, (together, Pennichuck) have challenged the constitutionality of RSA Chapter 38 before the

Hillsborough County Superior Court, Southern District in a Petition for Declaratory Judgment filed on February 4, 2004. Pennichuck's Superior Court Petition is attached to Nashua's Petition as Exhibit H. In the Petition for Declaratory Judgment, Pennichuck seeks, *inter alia*:

1) a ruling that RSA 38:9-11 fails to provide Pennichuck with equal protection of the law with respect to its fundamental private property right, contrary to N.H. Constitution pt. I, art. 12;

2) a ruling that Nashua's actions, specifically its alleged delaying behavior, has deprived Pennichuck of its right to engage in commerce and constitutes an unconstitutional temporary and permanent taking of Pennichuck's private property rights, contrary to N.H. Constitution, pt. I, art. 12, 83;

3) a ruling that the time frame within which Nashua could file its RSA 38 Petition with the Commission has expired, due to a short limitations period and under a theory of laches; and

4) a ruling that Nashua's notice pursuant to RSA 38:6 is invalid in that it seeks property Pennichuck avers is not necessary for municipal utility service in the City of Nashua. The Pennichuck Utilities also filed, among other things, a Motion for Preliminary Injunction as well as a Special Declaration with the Hillsborough County Superior Court, Southern District.

On May 3, 2004, the Commission issued a Secretarial Letter stating it would defer issuing an Order of Notice in Docket No. DW 04-048 in order to allow the Superior Court time to act on the Pennichuck Utilities' Motion for Preliminary Injunction. On June 7, 2004, the Superior Court denied the request for a preliminary injunction. Subsequently, on June 10, 2004, Nashua filed with the Commission a letter citing the Superior Court order and asking the Commission to issue an Order of Notice and to commence proceedings in the instant docket.

The Pennichuck Utilities, on June 15, 2004, similarly requested that the Commission convene the parties as soon as possible to consider the status of the docket and address procedural issues, including the Pennichuck Utilities' Motion to Dismiss.

Inasmuch as the Superior Court has denied Pennichuck's Motion for Preliminary Injunction, the Commission has determined, consistent with the May 3, 2004 Secretarial Letter, that it is appropriate to issue an Order of Notice at this time and to hold a Prehearing Conference for the limited purposes of addressing motions for intervention, receiving a report from the City of Nashua and the Pennichuck Utilities on the current procedural status of other court proceedings, and to hear oral argument on certain preliminary matters, namely:

- 1) Whether it is appropriate for the Commission to proceed to consider Nashua's Petition for Valuation;
- 2) Whether counsel for the Pennichuck Utilities is disqualified from representing it in this proceeding; and
- 3) Whether the Town of Milford's Motion to Consider and Maintain Effectiveness of Existing Contract is premature.

The Commission does not intend to entertain statements of position regarding Nashua's valuation petition at the Prehearing Conference. Moreover, there will not be a technical session following the Prehearing Conference. The Commission, therefore, will defer, among other things, hearing statements of position and establishing a procedural schedule, pending resolution of the preliminary matters noted above.

Based upon the foregoing, it is hereby

ORDERED, that a Prehearing Conference, pursuant to N.H. Admin. Rules Puc 203.05, be held before the Commission located at 8 Old Suncook Road, Concord, New Hampshire on July 28, 2004 at 10:00 a.m., at which each party will provide oral arguments on issues noticed in this order; and it is

FURTHER ORDERED, that pursuant to N.H. Admin. Rules Puc 203.01, the City of Nashua shall notify all persons of this docket and the issues presented in this Order of Notice by publishing a copy of this Order of Notice no later than July 7, 2004 in *The Telegraph*, *Concord Monitor*, and *Union Leader*, publication to be documented by affidavit filed with the Commission on or before July 28, 2004; and it is

FURTHER ORDERED, that the Executive Director shall notify all persons desiring to be heard at this hearing by publishing in a newspaper with statewide circulation , no later than July 2, 2004, a display ad setting forth the purpose, time and place of the hearing; and it is

FURTHER ORDERED, that the City of Nashua shall mail a copy of this order, no later than July 14, 2004, by first class U.S. mail, to the clerks of each municipality within which plant and property of the Pennichuck Utilities exists, proof of mailing to be documented by affidavit filed with the Commission on or before July 28, 2004; and it is

FURTHER ORDERED, that pursuant to N.H. Admin. Rules Puc 203.02, any party seeking to intervene in this proceeding who has not previously intervened shall submit to the Commission an original and eight copies of a Petition to Intervene with copies sent to the Office of the Consumer Advocate on or before July 23, 2004, such Petition stating the facts demonstrating how its rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding, as required by N.H. Admin. Rule Puc 203.02 and RSA 541-A:32,I(b); and it is

FURTHER ORDERED, that any party objecting to a Petition to Intervene make said Objection by filing an original and 8 copies thereof, with a copy provided to the Office of Consumer Advocate, on or before July 28, 2004.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of June, 2004.

Debra A. Howland
Executive Director & Secretary

Individuals needing assistance or auxiliary communication aids due to sensory impairment or other disability, should contact the Americans with Disabilities Act Coordinator, NHPUC, 8 Old Suncook Road, Concord, New Hampshire 03301-7319; 603-271-2431; TDD Access: Relay N.H. 1-800-735-2964. Notification of the need for assistance should be made one week prior to the scheduled event.